Supreme Court, U.S.
FILED

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No. ____

In The

SUPREME COURT OF THE UNITED STATES

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Vishnue I. Jennings
*Petitioner*

vs.

KELLOGG COMPANY, LOCAL 50
AMERICAN FEDERATION OF GRAIN
MILLERS
*Respondents*

---

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
Eighth Circuit

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# SUPPLEMENTAL APPENDIX

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Vishnue I. Jennings
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24pp

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
|---|---|---|
| VISHNUE I. JENNINGS, Plaintiff, | ) | 8:98CV423 |
| vs | ) | MEMORANDUM |
| | ) | AND |
| KELLOGG USA, INC., and AMERICAN FEDERATION OF GRAIN MILLERS LOCAL NO. 50, Defendants. | ) | ORDER |

## I. Introduction

Before me is a welter of motions and other submissions in this pro se action brought by the plaintiff, Vishnue I. Jennings (Jennings), against her employer, Kellogg USA, Inc. (Kellogg), and her former union, American Federation of Grain Millers Local No. 50 (AFGM). The plaintiff first filed her action in the United States District Court for the Western District of Tennessee in June 1998, alleging that the defendants discriminated against her on the basis of her race, color, and sex in violation of Title VII of Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.* (as amended). The Plaintiff moved to transfer venue, and the action was transferred to this court in August 1998.

All parties now seek summary judgment. In addition, the parties have filed numerous motions related to their motions for summary judgment. The outstanding motions include:

1. Kellogg's motion (filing No. 130) for summary judgment (index of Evidence in Support of Motion, Filing No. 131);
2. AFGM's motion (filing No.136 )for summary

judgment (Index of Evidence in Support of Motion, Filing No. 137; Supplementary indexes of evidence, filing Nos. 164, 176);

3. Jenning's motion (filing No. 199) for summary judgment, entitled "Plaintiff's Memorandum in Support of Petition for Summary Judgment";

4. AFGM's motion (filing No. 154) to strike portions of plaintiff's affidavit;

5. Kellogg's motion (filing No. 159) to strike itemization of undisputed material facts;

6. Kellogg's motion (filing No. 162) to strike affidavit in support of plaintiff's response and objection to defendant's motion for summary judgment;

7. Kellogg's motion (filing No. 162) to strike plaintiff's disputed material facts and issues;

8. Kellogg's motion (filing No. 163) to strike the affidavit of Vishnue I. Jennings;

9. AFGM's motion (filing No. 166) to strike affidavits and statement of disputed material facts and issues;

10. Jenning's motion (filing No. 169) to strike all of defendant's motions and briefs;

11. Jenning's motion (filing No. 177) to strike defendant's supplement to its motion for summary judgment;

12. AFGM's motion (filing No. 179) to dismiss for lack of subject matter jurisdiction;

13. Jenning's motion (filing No. 180) to strike reply brief, supplemental brief, and reply to plaintiff's motion to strike;

14. Jenning's motion (filing No. 181) to strike defendant's motion for summary judgment;

15. Jennings' motion (filing No. 185) to strike the defendant's motion to dismiss;

16. AFGM's motion (filing No. 188) for an order permitting a reply brief;
17. AFGM's motion (filing No. 190) to dismiss for failure to exhaust administrative remedies;
18. AFGM's motion (filing No. 190) in limine;
19. Jenning's motion (filing No. 191) to strike documents filed after defendant's motion for summary judgment;
20. Jenning's motion (filing No. 192) to strike defendant's motion for summary judgment;
21 AFGM's motion (filing No. 193) to allow responsive affidavits;
22. Jenning's motion (filing No. 194) to dismiss defendant's motion in limine;
23. Jenning's motion (filing No. 195) to strike defendant's exhibits;
24. Kellogg's motion (filing No. 200) to continue the trial date; and
25. AFGM's motion (filing No. 205) in limine.

In addition to these motions, Jennings submitted other documents, the titles of which do not conform with pleading practice in this court, but which clearly relate to the motions for summary judgment of the trial of her claims. Because Jennings appears pro se and is unfamiliar with the requirements of the Federal Rules of Civil Procedure or this court's local rules, the clerk's office has, where possible, given her submissions their proper titles and made them part of the record. In other instances, I have attempted to construe Jenning's submissions in such a way to give them the intended legal effect. Some submissions, however, defied classification; these played no role in my decisions here.

I have now reviewed the extensive record, the parties' motions for summary judgment and

their voluminous indexes of evidence, the parties' supporting and opposing briefs, the parties' other submissions, and the applicable law, and I conclude that the plaintiff's motion for summary judgment should be denied, Kellogg's motion for summary judgment should be granted, and the AGFM's motion for summary judgment should be granted.

## II. Summary Judgment Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the court grants summary judgment if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). When viewing the evidence, all ambiguities and inferences to be drawn from the underlying facts are resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial are resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Since this case is before me on cross-motions for summary judgment, the rule has the end result that I take each side's facts in the light most favorable to that side. The court's function at the summary judgment state is not to weigh the evidence and determine the truth of the matter but rather to determine whether a genuine issue exists for trail. *Rayes v. Eggars, 838 F. Supp.* 1372, 1377 (D. Neb. 1993) (*citing Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249).

In the Eighth Circuit, summary judgment is granted sparingly in employment discrimination

cases because they frequently rise and fall on inference to be drawn from circumstantial factors, and, accordingly, the trial courts are careful not to usurp the job of the fact-finders. *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994); *Davis v. Fleming Cos.*, 55 F.3d 1369, 1371 (8th Cir. 1995); *Hardin v. Hussman Corp.*, 45 F.3d 262, 264 (8th Cir. 1995); *Oldham v West*, 47 F.3d 985, 988 (8th Cir. 1995). Therefore, summary judgment should only be granted in those rare instances "where there is no dispute of fact and where there exists only one conclusion." *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1987); *Hillebrand v. M-Tron Industries, Inc.*, 827 F.2d 363, 364 (8th Cir. 1987).

## III. Factual Background

Despite the amount of the paper the parties have expended to advance their respective positions, this is not a factually complex case. Jennings is an African-American woman who has been an employee of Kellogg for over twenty years. During the time of the events underlying the motions for summary judgment, she worked at the Omaha facility and was a member of AFGM. Kellogg and AFGM had a master collective bargaining agreement and a supplemental collective bargaining agreement regarding the Omaha facility. The agreements contained grievance procedures and required binding arbitration of unresolved grievances. Filing No. 131, Kellogg's Index of Evidence Supporting Motion for Summary Judgment, Aff. of T. Silsbee, Exs. DD, EE (hereafter, Kellogg's Index).

All employees received a copy of the Kellogg employee handbook setting out Kellogg's

policies, facilities, and services. *Id*, Ex. FF. In a section entitled "Working Together," the handbook sets out three groups of infractions for which employees can be disciplined. Group I infractions are the most serious: "[T]he first violation would probably call for discharge. The employee would be suspended, their time card run out, and notified later when the hearing would be held." *Id.* at 17. Included among the Group I infractions is "[d]eliberate abuse or destruction of company property, contamination of food, sabotage." *id.* at 18 ¶ 6.

In many of her submissions, Jennings alleges that during the time she worked at the Omaha facility, tension existed between employees who had been working at the Omaha facility and other employees, such as Jennings, who had transferred into the Omaha facility from the Memphis, Tennessee, facility. She also alleges that racial discrimination was prevalent at the Omaha facility. See, *e.g.*, Filing No. 199, Plaintiff's "Petition for Summary Judgment" at 6-7, ¶¶ 29-31, 36-38.

In September 1996, Kellogg accused Jennings and two other employees, Don Jackson and Margaret Welch, of sabotage during a strike. Following an investigation, Kellogg held a suspension hearing for each employee. Kellogg's Index, Aff. of T. Silsbee, Exs. A-E, M-O, T-Y. Kellogg terminated all three employees on October 15, 1996, for violating the Group I rule prohibiting sabotage quoted above. The AFGM filed a grievance on behalf of each employee the same day, but Kellogg denied the grievances on October 21, 1996. *Id.*, Exs. F-G, P-Q, Z-AA. The grievances then went to arbitration. Jennings was

represented by M.H. Weinberg, counsel for the AFGM.

In January 1997, Jennings filed a discrimination charge against Kellogg and the AFGM with the Nebraska Equal Opportunity Commission (NEOC). She alleged that based on her race, color, and sex, Kellogg had subjected her to a "hostile work environment" at the Omaha plant, ignored her seniority, denied her overtime, subjected her to intimidation, suspended and then terminated her, denied her grievances and appeals, and refused her access to her savings and investment monies. *Id.*, EX. K. In December 1997, the NEOC found no reasonable cause to support the allegations of sex or race discrimination. *Id.*, Ex L. In March 1998, the federal Equal Opportunity Commission issued a right to sue letter to Jennings. Filing No. 1, Att. 1. Jennings also apparently filed a complaint against the AFGM with the National Labor Relations Board. *Id*, Att. 2. The Board found that the AFGM had not breached the National Labor Relations Act.

In November 1997, the arbitrators handed down their decisions. Arbitrator Frank J. Murphy, S.J., affirmed Jennings's grievance in part and denied it in part, and ordered Kellogg to reinstate her but without back pay. Based in large measure upon the testimony of a white female Kellogg employee, the arbitrator found that Jennings "approved the sabotage although it was not shown that she actually engaged in it." *Id.*, EX. 1 at 14. Arbitrator Richard V. Penfiled affirmed the grievance of Don Jackson, who is white, ordering Kellogg to reinstate him with back pay. Arbitrator John R. Thornell denied the grievance of Margaret

Welch, who is white. *Id.*, Exs. S, CC. Jennings did not appeal the arbitrator's award.

Kellogg reinstated Jennings, but in December 1997 she filed a grievance requesting reimbursement of her union dues and an award of over $88,000 in back pay. *Id.*, Ex. J. In the grievance, she also resigned her membership in the AFGM, claiming that the union had failed to defend her adequately against the sabotage charge and during the arbitration. Kellogg denied the grievance. Jennings did not appeal this denial or seek arbitration.

In June 1998, Jennings filed this pro se action in the United States District Court for the Western District of Tennessee. That court granted Jennings's motion to transfer venue to this district in August 1998. Jennings's complaint alleges that based on her race, color and sex, 1) Kellogg terminated her employment for alleged sabotage, and 2) the AFGM breached its duty to provide her with fair representation during the suspension and arbitration process. Filing No. 1, Complaint at 3-4. Jennings seeks back pay (including five weeks of vacation pay) for the time from her suspension until her reinstatement.

## IV. Discussion

Title VII of the Civil Rights Act of 1964 forbids discrimination in employment. Section 703(a)(1) of Title VII makes it an unlawful employment practice for an employer to "discriminate against any individual with respect to ... compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. §2000e(a)(1).

Where the plaintiff offers circumstantial evidence to prove discrimination, the sequence and allocation of proof are governed by the Supreme Court decision in *McDonnell Douglas Corp. v Green*, 411 U.S. 792, 800-06 (1973). If the plaintiff succeeds in initially establishing a prima facie case of discrimination which the employer cannot explain, a presumption arises that the employer unlawfully discriminated against the plaintiff. The burden of production then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment action. If the defendant is successful, then the presumption raised by the prima facie case is rebutted. The burden shifts back to the plaintiff to show that the employer's proffered reason was merely a pretext of discrimination.

Here, Kellogg first argues that because Jennings cannot establish that Kellogg violated Title VII, her claim must be dismissed as a matter of law. To establish a prima facie case of employment discrimination, a plaintiff must show that 1) the plaintiff is a member of a protected class; 2) the plaintiff was qualified for the job the plaintiff was performing; 3) the plaintiff suffered an adverse employment action; and 4) a nonmember of the protected class was not subjected to the same adverse employment action. *Thomas v St. Luke's Health Systems, Inc.*, 869 F. Supp. 1413, 1434 (N.D. Iowa 1994). Kellogg admits that Jennings meets the first two elements and will even concede the third element, regardless of whether the adverse employment action is seen as Jennings's discharge following the alleged sabotage or as the arbitrator's refusal to award her back pay. Kellogg contends,

however, that Jennings cannot establish that similarly situated white and/or male Kellogg employees were treated differently.

I agree that Jennings cannot establish that she was treated differently when she was terminated. Kellogg accused two other employees besides Jennings of sabotage. Kellogg terminated all three employees at the same time. Both of the other employees were white; one was male. Yet only the white male and Jennings were reinstated following arbitration; the white female's termination was upheld. Jennings thus cannot demonstrate any racially disparate treatment in the termination process.

I also agree that as a matter of law, Jennings cannot establish that Kellogg discriminated against her with regard to the arbitrator's reinstatement award. Fr. Murphy was a neutral, impartial arbitrator whom the AFGM and Kellogg jointly chose to resolve the parties' claims. Jennings has offered no evidence that Fr. Murphy had either hidden allegiances to Kellogg or any vested interest in the outcome of the arbitration, or that he in any manner violated the Arbitrator's Code of Professional Responsibility. As Kellogg points out, Murphy could hardly have been an agent under Kellogg's control, given his decision to reinstate Jennings after Kellogg had terminated her.

If Jennings believed that Fr. Murphy discriminated against her on the basis of her sex or race by reinstating her but not awarding her back pay, then her legal recourse would have been to appeal the arbitration award, not to sue Kellogg for discrimination when it implemented Fr. Murphy's decision. Moreover, Kellogg had no

obligation to guarantee that the three arbitrators came to identical decisions or to deal with all three terminated employees as if they had. *Jones v Frank*, 718 R. Supp. 931, 933-34 (S.D. Fla. 1989). See also *Wynn v North American Systems, Inc.*, 608 F. Supp. 30, 34 (N.D. Ohio 1984).

Kellogg also argues that even assuming Jennings could establish a prima facie case of disparate treatment, its "zero tolerance" of conduct which destroyed or sabotaged company property or contaminated food products was a legitimate, nondiscriminatory reason for terminating Jennings's employment. Kellogg maintains that because such conduct could have devastating impact on consumers of its food products, all Kellogg employees are told that any "deliberate abuse or destruction of company property, contamination of food, or sabotage" will result in discharge. Kellogg's Index, Ex. FF at 17-18. Kellogg's discharge-for-sabotage rule thus punishes any employee destroying company property or jeopardizing the health or safety of millions of consumers of Kellogg products. Jennings could hardly be unaware of the discharge-for sabotage policy, given the length of her employment with Kellogg, nor could she have reasonably expected Kellogg to deviate from the policy once its internal investigation indicated that the three employees had engaged in sabotage. Kellogg was entitled to enforce its policy. See *Hutson v McDonnell Douglas Corp.*, 63 F. 3d 771, 781 (8th Cir. 1995). ("[E]mployment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the widsom or fairness of the business judgments made by employers, except

to the extent that those judgments involve intentional discrimination.").

Finally, Kellogg argues that Jennings cannot show that its discharge-for-sabotage policy was a pretext and that discrimination was the real reason for its decision to terminate her. A plaintiff retains at all times the ultimate burden of persuading the trier of fact that the adverse employment action was motivated by intentional discrimination. *Rothmeier v. Investment Advisers, Inc.*, 85 F. 3d 1328, 1332 (8th Cir. 1996). If the analysis reaches this pretext stage, a plaintiff can avoid summary judgment only if the evidence considered in its entirety creates 1) a fact issue as to whether the employer's proffered reasons are pretextual, and 2) a reasonable inference that the particular trait (i.e., race, color, religion, sex, age or national origin) was a determinative factor in the adverse employment action. *Id.* at 1336-37.

Jennings does not dispute the basic facts Kellogg has put forth. Kellogg accused three employees of sabotage. One was a white male, one was a white female, and one was Jennings - a black female. All three were investigated; all three received suspension hearings; all three were terminated; all three grieved their discharge through arbitration. The white man and the black woman were reinstated following arbitration; the white woman was not. Despite Jennings's passionate but unsubstantiated arguments to the contrary in her many submissions, the racial and gender mix of the terminated employees precludes a finding that Jennings's termination was a pretext for intentional discrimination. The evidence also precludes any inference that Jennings's race and

gender were determinative factors in Kellogg's decision to terminate her for her role in the alleged sabotage. Consequently, Jennings has not demonstrated the existence of specific facts that create a genuine issue on pretext. She has failed to establish as a matter of law that she was a victim of disparate treatment at the hands of her employer.

I turn next to the union's motion for summary judgment. The legal theory underlying Jennings's action against the AFGM is not entirely clear from her pleadings and submissions since they lack, for the most part, any citations to precedential legal authority. Jennings does not appear to claim that the AFGM violated a procedural provision of the collective bargaining agreements. Instead, her claim seems to be that the union failed to represent her fairly against Kellogg's charges that she sabotaged equipment at the Omaha facility. Jennings passionately maintains that because she did not engage in any sabotage, the arbitrator's decision that she had nevertheless approved of it must therefore be the result of the union's failure to represent her competently and fairly.

Jennings's pleadings and submissions detail her perceptions of the racial tensions at the Omaha facility prior to the alleged sabotage recount her version of the events leading up to her discharge for sabotage; criticize the presentation of evidence at the discharge hearing and arbitration; and personally attack the white female who was the principal witness against her, Mike Jens, the business agent for the AFGM, and counsel for the AFGM. She appears to claim that because the union's counsel failed to get her an award of back pay along with reinstatement, this court should set

aside the arbitrator's decision,[1] declare her innocent of the sabotage charge, and award her back pay. Jennings asks too much.

Under the National Labor Relations Act, the AFGM has a statutory duty *fairly to represent all ...employees, both in its collective bargaining ... Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.*
*Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

The statute of limitations for bringing an action alleging a breach of the statutory duty of fair representation is six months. *DelCostello v. International Brotherhood of Teamsters*, 462, U.S. 151, 172 (1983). Here, Arbitrator Murphy handed down his decision on November 29, 1997. Jennings filed her complaint in the Tennessee federal court on June 3, 1998. Jennings thus missed filing her claim within the six-month window. Consequently, her claim against the AFGM for breach of its statutory duty of fair representation cannot stand.

Violation of a duty of fair representation, however, can also be the basis of a suit under Title VII. To establish a prima facie Title VII case against a union based on a breach of the duty of

[1] I emphasize that Fr.Murphy's decision is not at issue in this lawsuit. Courts in this circuit, however, are obliged, however, to pay great deference to arbitrator's decision. "Recognizing the 'strong policy favoring judicial enforcement of collective-bargaining contracts,' courts generally will not 'undertake to review the merits of arbitration awards, but [will] defer to the tribunal chosen by the parties ... to settle their damages.'" *Carnes v. UPS, Inc.*, 51 F.3d at 117 (quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562, (1976) ).

fair representation, a plaintiff must show that the union breached the duty and that the breach was motivated by the plaintiff's race, color, or sex. *Martin v. Local 1513*, 859 F.2d 581, 584 (8th Cir. 1988). See also *Carter v Chrysler Corp.*, 173 F.3d 693, 704 (8th Cir. 1999) (plaintiff must produce evidence of union's "discriminatory animus").

The AFGM contends that throughout the grievance and arbitration process, it provided equally competent and zealous representation for all three Kellogg employees accused of sabotage. Jennings claims, however, that the AFGM abetted white witnesses in lying under oath because it had not adequately investigated their stories; failed to force Kellogg to take disciplinary action against the employees who, according to Jennings, allegedly lied; refused to allow her to testify on her own behalf at the arbitration hearing to rebut the white female employee's testimony, although she had already presented her side of the story during Kellogg's case in chief; failed to inform her that she could appeal the arbitrator's award; and discriminated against her based on her race and gender. Filing No. 1, Complaint at 3-6.

The first element of a prima facie case for breach of the duty of fair representation under Title VII occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. at 190. In addition, when a plaintiff alleges racial discrimination under Title VII, courts use the "same standard as that enunciated in other unfair representation cases." *Miller v. Coca Cola Bottling Co.*, 496 F. Supp. 1168, 1176 (D. Ark. 1980). The standard for determining whether a union has breached the

duty of fair representation is a flexible one: "[S]o long as a union exercises its discretion in good faith and with honesty of purpose, a 'wide range of reasonableness must be allowed.'" *NLRB v. American Postal Wkrs. Union*, 618 F.2d 1249, 1255 (8th Cir. 1980) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ). "Mere negligence, poor judgment, or incompetence are insufficient to establish a breach of the duty of fair representation." *Carnes v. UPS, Inc.* 51F.3d 112, 116 (8th Cir. 1995). Thus, unless the record reveals some evidence of arbitrary, discriminatory, or bad faith conduct on the AFGM's part, Jennings's Title VII claim against the AFGM must fail.

I find that Jennings has not demonstrated that the union engaged in any arbitrary, discriminatory, or bad faith conduct against her. I have reviewed both parties' voluminous indexes of evidence, which include Kellogg's investigatory notes of the alleged sabotage that formed the basis for the suspension hearings for the three employees; the transcripts of all three arbitration hearings, along with the parties' briefs submitted to the arbitrators; Jennings's many declarations and affidavits submitted at various stages of the proceedings, most of which attack the veracity of Mike Jens and the credibility of the white female employee who testified against her at the arbitration hearing; the discovery documents filed in this case, including Jennings's deposition; and the arbitrators' decisions. In over a thousand pages of material, I see no evidence that the AFGM failed to "exercise [] its discretion in good faith and with honesty or purpose."

The AFGM presented the cases of all three

discharged employees to impartial arbitrators. Jennings and Jackson prevailed and as a result were reinstated; Margaret Welch, a white female, was terminated. It is difficult to understand how Jennings can now argue that the AFGM faltered in its representation of her, given that counsel for the AFGM managed to secure her reinstatement following charges that she had violated one of her employer's most absolute rules, the zero tolerance of sabotage.

Moreover, Jennings does not acknowledge that the AFGM had no control over the award Arbitrator Murphy designed after hearing all the evidence. Counsel for the union argues vigorously in his closing statement and in the grievant's brief that Jennings should be reinstated with full back pay and all rights. He also asked the arbitrator, in coming to a remedy, to consider the many mitigating factors should he find that Jennings had engaged in sabotage or a production slow-down. The arbitrator's decision makes it clear that he weighed the credibility of the witnesses, including the white female employee who accused Jennings of sabotage and Jennings herself, in reaching his determination that Jennings "approved the sabotage although it was not shown that she actually engaged in it." For her disloyalty in approving the sabotage, the arbitrator ordered her reinstated but refused to grant her back pay. Since the union had no hand in fashioning this award, it would be unjust to hold the union responsible for it now. I find that Jennings cannot establish that the union breached its duty of fair representation.

Nor can Jennings present enough evidence of discrimination by the union to create a genuine issue of material fact as to the second element of a

prima facie case, a showing of "discriminatory animus." While Jennings alleges that racial tensions were high at Kellogg's Omaha plant following her transfer from Memphis, she cannot connect those tensions to the AFGM's handling of her suspension hearing and arbitration. Nor can she refute the bare facts: Margaret Welch, a white female, lost her job for her acts of sabotage, while Don Jackson, a white male, and Jennings, a black female, both regained their positions. That Jackson also received full back pay from the arbitrator who decided his case does not establish that the union "intentionally and invidiously discriminated against" Jennings. *Carter v. Local No.* 789, 963 F.2d 1078, 1082 (8th Cir. 1992). Jackson's award means only that his arbitrator weighed the evidence and the credibility of the witnesses -- including the white female employee and Jennings herself -- differently in reaching his conclusion that Kellogg had failed to prove by clear and convincing evidence that Jackson "tampered with machinery in a negative way, or ... stated that he intended to do so." Filing No. 137A, AFGM's Index of Evidence Supporting Motion For Summary Judgment, Jackson Arbitration Decision at 12. Jennings simply has not offered any competent evidence to create a factual question about whether the arbitrator's decision to deny her back pay was a result of the union's breach of its duty of fair representation or of the union's "invidious discrimination" against her motivated by her race, color, or gender.

Jennings also maintains that the union failed her by not appealing the arbitrator's award. Plaintiff's Brief Opposing AFGM's Motion for Summary Judgment at 4. She claims that she did

not appear before the union's executive board to request an appeal of the arbitrator's decision because counsel for the union allegedly told her that the arbitrator's decision was final and that she had no recourse. Filing No. 176, AFGM's Supp. Index of Evidence, V. Jennings Dep. 92: 14-23. She also states, however, that she believes she in fact "appealed" the arbitrator's decision to withhold back pay by filing her EEOC claim. *Id.*, 93: 3-5. She states that if she prevails in this Title VII case, she will receive as minimum damages what the arbitrator withheld from her - back pay - and what Kellogg denied her - five weeks' vacation pay.

The AFGM responds that while Jennings may claim that she did not know she could appeal, Jennings was nevertheless aware that she could have taken up the possibility of an appeal with the executive board because she previously had appeared before the board to demand that the union arbitrate her dismissal. Nor, the union notes, did Jennings ever appeal to the executive board Kellogg's rejection of her second grievance for back pay following the arbitrator's decision, electing instead to proceed with this Title VII action. Finally, the union argues that an appeal of the arbitrator's decision would have been futile because Jennings cannot identify specific errors on the arbitrator's part that would justify a reversal of the award, apart from her belief that the arbitrator did not understand how the line worked. *Id.*, 101: 1-105:4.

I conclude that Jennings was well aware of her options under the union's constitution and by-laws as a long-time union member, as indicated by her post-discharge appearance before the union's

executive board to demand that the union take her case to arbitration. Following the arbitrator's decision, Jennings apparently elected to by-pass the executive board entirely and instead to pursue her remedies with the EEOC and this court. She is now bound by her decision. The record contains no evidence from which I can infer that the union acted arbitrarily or with a discriminatory motive in not processing an appeal of the arbitrator's decision.

Given my decision granting the defendants' motions for summary judgment and denying plaintiff's motion for summary judgment, all remaining motions are hereby denied as moot.

IT IS THEREFORE ORDERED:

1. Kellogg's motion (Filing No. 130) for summary judgment is granted.

2. AFGM's motion (Filing No. 136) for summary judgment is granted.

3. Jenning's motion (Filing No. 199) entitled "Plaintiff's Memorandum in Support of Petition for Summary Judgment" is denied.

4. The following motions are denied as moot: Filings Nos. 154, 159, 161, 162, 163, 166, 169, 177, 179, 180, 185, 188, 190, 191, 192, 193, 194, 195, 200, and 205.

DATED this 18 day of May, 2000.

BY THE COURT:

/s/
Joseph F. Bataillon
United States District Judge

File date: May 18, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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| VISHNUE I. JENNINGS,<br>Plaintiff,<br>vs<br><br>KELLOGG USA, INC., and<br>AMERICAN FEDERATION<br>OF GRAIN MILLERS<br>LOCAL NO. 50,<br>Defendants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | 8:98CV423<br><br>JUDGMENT |

Pursuant to my Memorandum and Order entered today, judgment is entered in favor of the defendants, Kellogg USA, Inc. and American Federation of Grain Millers Local No. 50, and against the plaintiff, Vishnue I. Jennings.

DATED this 18 day of May 2000.

BY THE COURT:

/s/
Joseph F. Bataillon
United States District Judge

Filed: at District of Nebraska
May 18, 2000
Gary D. McFarland, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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|---|---|---|
| VISHNUE I. JENNINGS,<br>Plaintiff,<br><br>vs<br><br>KELLOGG USA, INC., and<br>AMERICAN FEDERATION<br>OF GRAIN MILLERS<br>LOCAL NO. 50,<br>Defendants. | ) | 8:98CV423<br><br><br><br>ORDER |

Before me is the plaintiff's pro se "petition to reconsider and set aside order" (Filing No. 213) pursuant to Federal Rule of Civil Procedure 59(e). The plaintiff's "petition" comes in response to my memorandum and order of May 18, 2000, in which I granted the defendants' motions for summary judgment. Rule 59(e) makes no mention of a motion to reconsider. Instead, it allows a party to file a motion to amend or alter a judgment within ten days after judgment is entered. I therefore treat the plaintiff's "petition" as a motion to amend or alter the judgment entered against her.

The plaintiff does not raise any evidence, legal theory, or argument I have not already considered in my prior rulings. Consequently, I decline to revisit the issue that the plaintiff attempts to renew in her motion.

IT IS THEREFORE ORDERED that the plaintiff's motion to reconsider is denied.

DATED this 7 day of June 2000.

BY THE COURT:

/s/

Joseph F. Bataillon
United States District Judge

Filed: District of Nebraska
June 07, 2000
Gary D. McFarland, Clerk